the accident we would calculate at $3,400 per annum.

Average annual income after accident (including son's and wife's efforts) – $4,000/-.

1/3 wages paid to son – $1,330 per annum.

Balance joint income by respondent and wife $4,000 - 1,330 = $2,670.

We agree that the son's income should be deducted from the total earning because he was already earning as a labourer and if he was not paid he would not do the work. The wife's income however should not be deducted because it is a joint income. According to the Manager's evidence so long as the monthly payments back to Felda are made it would not matter if the tapping was done by the wife and children of the settler rather than the settler himself. The way of life of settlers in such land schemes should be considered and apart from the deduction we have allowed for the son who otherwise would be working elsewhere it is the joint income of this self-employed respondent we should have in mind, rather than his individual capacity to tap rubber.

From the plaintiff's income before the accident *i.e.* $3,400 per annum should be deducted the sum of $2,670 leaving $730 per annum as the net loss of future earning which we would accept.

We accept the Judge's award of 8 years purchase according to the annuity tables so that the sum we would award under this heading would be $61 (monthly) times 8 years *i.e.* approximately $4,700/- (according to Annuity Table) and to round it off, we would make it $5,000/-.

The other item for pain and suffering, *i.e.* $15,000, we will leave unaltered.

There is only one other comment we wish to make and that is the reference by Wan Muttalib to the case of *Lim Eng Kay* v. *Jaafar bin Mohamed Said*[5] on which he relied for the proposition that general damages need not be pleaded. That case should be distinguished, for there pre-trial loss was pleaded but under the heading of general damages.

To recapitulate, we allow this appeal against quantum and would award the following figures:-

1. Special damages of $1.660/- as agreed with 3% interest per annum from date of accident to date of judgment;
2. Loss of future earning – $5,000/-;
3. Pain and suffering – $15,000/- with 6% interest per annum from date of service of writ to date of judgment;
4. Interest at 8% per annum on items (1), (2) & (3) from date of judgment to date of realisation;
5. Costs here and below.

Deposit to be refunded.

Appeal allowed.

Solicitors: *Wrigglesworth & Co.: Wan Abd. Muttalib & Co.*

NEW KOK ANN REALTY SDN. BHD. v. DEVELOPMENT & COMMERCIAL BANK LTD., NEW HEBRIDES (IN LIQUIDATION)

[S.C. (Lee Hun Hoe C.J. (Borneo), Wan Suleiman & Seah S.C. JJ.) June 16 & November 15, 1986]

[Kuala Lumpur – Supreme Court Civil Appeal No. 430 of 1985]

Contract – Claim in respect of two bank drafts – Loan – Act done for another person – Contracts Act, 1950, s. 71.

In this case the respondents brought an action to claim from the appellants repayment of loans of US$25,000.00 and US$100,000.00. It was alleged that the sums were paid to the appellants by bank drafts. The appellants denied requesting the respondent for the sums by way of loan or that they had agreed or promised to repay them. They further said that if the said sums were remitted by the respondents to the appellants they were not for the benefit of the appellants but for the use or benefit of Mosbert Finance (Hongkong) Ltd. or other persons or companies. The learned judge gave judgment in favour of the respondents under the heading of loans and section 71 of the Contracts Act, 1950. The appellants appealed.

Held, dismissing the appeal: the learned trial judge had rightly given judgment under the headings of loan and section 71 of the Contracts Act, 1950. He had considered that all the four conditions in section 71 of the Contracts Act, 1950, had been satisfied and the respondents had therefore established their claim under the said section.

Cases referred to:

(1) *Siow Wong Fatt* v. *Susur Rotan Mining Ltd. & Anor.* [1967] 2 M.L.J. 118.

(2) *Royal Bank of Canada* v. *Rex.* [1913] A.C. 283, 296.

(3) *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32, 61-64.
(4) *Walker* v. *Wimborne* (1976-1977) 137 C.L.R. 1, 6.
(5) *Miliangos* v. *George Frank (Textiles) Ltd.* [1975] 3 W.L.R. 758.
(6) *Sinclair* v. *Brougham* [1914] A.C. 398, 417, 454-456.
(7) *Transvaal and Delagoa Bay Investment Co. Ltd.* v. *Atkinson* [1944] 1 All E.R. 579, 583, 584.
(8) *Suchand* v. *Balaram* (1910) I.L.R. 38 Cal. 1.
(9) *State of West Bengal* v. *B.K. Mondal & Sons* A.I.R. 1962 S.C. 779, 790; [1962] S.C.R. 876.

HIGH COURT.

T. Thomas for the plaintiff.
K. Y. Choo for the defendant.

Cur. Adv. Vult.

Gunn Chit Tuan J.: In this suit the plaintiff, Development and Commercial Bank Limited, New Hebrides (In Liquidation), a company incorporated in the New Hebrides (now known as Vanuatu) was at all material times, until it was ordered to be wound up by the New Hebrides High Court on April 30, 1976, (exhibit P8) carrying on the business of a bank. The suit was therefore presented by the plaintiff in 1981 through the Official Receiver of Vanuatu as the liquidator of the plaintiff (exhibit P9) to claim repayment of loans of US$25,000 and US$100,000, alternatively the equivalent thereof in ringgit, from the defendant, New Kok Ann Realty Sdn. Bhd.

It was averred in paragraphs 3 and 4 of the amended statement of claim that by a cheque (which has been duly honoured) dated June 23, 1975, and drawn by the plaintiff on Peninsula National Bank of Burlingame, U.S.A., (P.N.B.), the plaintiff advanced by way of loan to the defendant the sum of US$25,000/–. By a cheque (which has also been duly honoured), dated August 18, 1975, and likewise drawn by the plaintiff on the said Peninsula National Bank, the plaintiff advanced to the defendant by way of loan the further sum of US$100,000/–.

In paragraph 7 of the amended statement of claim it was averred further and in the alternative, if (which is denied), it be held that the said sums of US$25,000 and US$100,000 were not advanced to the defendant on expressed terms that each, was to be a loan, the plaintiff would contend that the defendant received the same to its use and is liable to account therefor as money had and received.

In paragraph 7A of the statement of claim, the amendment of which was objected to by Mr. K.Y. Choo, counsel for the defendant, and allowed by me, it was averred in the further alternative that the plaintiff contends that the defendant is bound by the provisions of section 71 of the Contracts Act, 1950, to repay or to make compensation to the plaintiff in the sum of US$125,000.

The defendant in paragraph 3 of the amended defence averred that it did not at any time or at the material time request the plaintiff for the grant of the alleged advance by way of loan of US$25,000 or the sum of US$100,000 alleged in paragraphs 3 and 4 of the plaintiff's statement of claim, and the plaintiff did not at any time grant to the defendant the said two loans or either of them or at all. It was also stated in paragraph 5 of the amended defence that if, which is denied, that the alleged two sums of US$25,000 and US$100,000 were paid into the account of the defendant, the defendant avers that it had not at the material time or at any time agreed or promised to repay to the plaintiff the said sums or any other sum. The defendant also pleaded that, if which is denied, that the said two sums of US$25,000 and US$100,000 were remitted to the defendant they were not received by the defendant to its use and/or for its benefit. In the further alternative it was averred by the defendant in paragraph 7 of the amended defence that if the said two sums of money were remitted by the plaintiff to the defendant, which is denied, the defendant stated that they were not for the use or benefit of the defendant but for the use and benefit of Mosbert Finance (Hong Kong) Limited and/or other persons or companies.

A solicitor called Murram Bruce Elrington (P.W.2) from the Official Receiver's office, Hong Kong, told the court that a Mosbert Liquidation Unit was set up in 1976. There were many companies in the Mosbert Group in which one Amos Dawe had an interest. There were about 30 companies in Hong Kong, Singapore, New Hebrides and Malaysia. The Official Receiver of Hong Kong was appointed liquidator of some of these companies including the plaintiff and he started work in the said Unit about six months ago. Apart from the said exhibits marked P8 and P9 this witness also produced a copy of the order of the Supreme Court of Vanuatu (exhibit P10) authorising the Official Receiver, Hong Kong, to bring actions anywhere in the world on behalf of the plaintiff.

That witness told the court that the first thing

they did was to get the books of the plaintiff. They took possession of such records from the office of the company as they could get and proceeded to check to see whether there was any wrong doing. He then pursued claims of the plaintiff against its debtors. When he was shown the copy of the cheque appearing on page 1 of the agreed bundle of documents marked "A", the witness said that the said cheque was referred to in the general ledger and journal maintained by the plaintiff. He then identified pages 3 to 6 of "A" as part of the general ledger of the plaintiff which was kept in Hong Kong. The witness also told the court that the letters "P.N.B." at the top of pages 3 and 4 of "A" mean Peninsula National Bank, and pointed out that an entry on page 4 of "A" shows that a cheque No. 103 for US$25,000 was made out to New Kok Ann Realty Sendirian Berhad on June 23, 1975. The witness also produced a payment voucher dated June 23 (exhibit P.11) which was authority for the payment to New Kok Ann Realty Sendirian Berhad of a sum of US$25,000 by cheque No. 103. When shown a copy of a ledger sheet for Peninsula National Bank appearing on page 5 of "A" the witness confirmed that that was evidence of payment of US$25,000 to New Kok Ann Realty Sendirian Berhad on June 23, 1975.

Mr. Alrington then said that the copy of the cheque appearing on page 2 of "A" was a draft No. 230 dated August 18, 1975, made out to New Kok Ann Realty Sendirian Berhad for a sum of US$100,000. On the reverse of that draft is shown the chop of the Far Eastern Bank, Singapore. The witness referred again to the ledger folio of the plaintiff appearing on page 3 of "A" and told the court that the fourth item on that page is an entry that on August 18, 1975, US$100,000 was paid to New Kok Ann Realty Sendirian Berhad per cheque No. 230. He then produced the relevant payment voucher (exhibit P12) in which it is shown that a cheque for US$100,000 drawn on P.N.B. was paid to New Kok Ann Realty Sendirian Berhad. After reference to another ledger sheet for P.N.B. appearing on page 6 of "A" the witness explained that that shows that by voucher No. P8/28, payment of US$100,000 was made to New Kok Ann Realty Sendirian Berhad on August 18, 1975. The witness then produced the General Ledger and Journal of the plaintiff for the year ended December 31, 1975, and referred to a ledger sheet therein in respect of the defendant (exhibit P13) relating to "Loan and Advance."

He then pointed out that it shows that on August 18, 1975, US$100,000 was received by the defendant from P.N.B. After examining all the documents referred to, his department then sent the following letter to the defendant:

COPY

"L. 132/2/8/76.
5-221415.

July 26, 1980.

New Kok Ann Realty Sdn. Bhd.,
197-A Batu 4 1/2,
Jalan Sendai,
P.O. Box 224,
Johore Bahru,
Johor.

Dear Sirs,

Your Indebtedness due to Development & Commercial Bank Ltd. (in liquidation)

I wish to inform you that I was appointed by the Official Receiver, New Hebrides in his capacity as the liquidator of Development & Commercial Bank Ltd. (DCBL), his attorney on 8th October, 1979.

According to the books and records of DCBL, you were indebted to the bank for a sum of US$125,000 being the amount received by you per cheques No. 103 and 230 drawn in your favour, on DCBL's account with Peninsula National Bank.

Copies of the cheques are enclosed for your reference.

I hereby require you to make payment of the aforementioned sum to me as attorney of the liquidator of the company. Your remittance should be sent to the address given at the head of this letter and be made payable to "The Official Receiver, Hong Kong." Please note that unless I receive your remittance within 14 days from the date hereof, I shall be at liberty to institute legal proceedings against you for the recovery of the debt without further notice.

Please note further that my demand refers only to the matter mentioned above. A separate demand will be sent to you in respect of any other matter in which you may be found later to be indebted to the company.

Yours faithfully,

SGD.
(K. O. Wong)
p John S. BUSH
Attorney for Liquidator
of Development & Commercial
Bank Limited.

Encl.
KOW/jl."

On August 11, 1980, the following reply was received from the defendant:

COPY

"NEW KOK ANN REALTY SENDIRIAN BERHAD
197-A, BATU 43, JALAN SCUDAI,
P.O. BOX 224, JOHORE BAHRU, JOHORE.
TEL: 61022 & 61203

Date: August 11, 1980

L. 132/2/8/76

Official Receiver *Attention: Mr. K O Wong*
(Mosbert Group Liquidation Unit)
Official Receiver's Office
Registrar General's Department REGISTERED
United Chinese Bank Building
31-37 Des Voeux Road, Central AIRMAIL
6th Floor
Hong Kong

Dear Sir

re: Alleged Indebtedness due to Development & Commercial Bank Ltd. New Hebrides

We refer to your letter of July 26, 1980 and please be informed that your letter is receiving our attention. We will reply you in due course when we have completed our examination of our records in respect of the above allegation of indebtedness to Development & Commercial Bank Ltd, New Hebrides.

Yours faithfully
SGD.
Phillip A S Yeo
Director."

That was the only reply from the defendant after which the following three letters were sent to it:

COPY

"Our Ref.: L. 132/2/8/76

August 15, 1980.

New Kok Ann Realty Sdn. Bhd.,
197-A Batu 4 1/2,
Jalan Sendai,
P.O. Box 224,
Johore Bahru,
Malaysia.

Dear Sirs,

Your indebtedness due to
Development & Commercial Bank Ltd.
(in liquidation)

Thank you for your letter of 11th instant.

I look forward to your remittance after you have completed checking your records.

Yours faithfully,
SGD.
(K.O. Wong)
p. John S. Bush
Attorney for Liquidation of
Development & Commercial Bank Limited."

"Our Ref.: L. 132/2/8/76.

September 5, 1980.

New Kok Ann Realty Sdn. Bhd.,
197-A Batu 4 1/2,
Jalan Sendai,
P.O. Box 224,
Johore Bahru,
Malaysia. Attn.: Mr. Phillip A.S. Yeo

Dear Sirs,

Your indebtedness due to
Development & Commercial Bank Ltd.
(in liquidation)

I refer to your letter of the 11th ultimo on the above subject.

I reckon that you have already got ample time to check your books. Please make your repayment without further delay.

Yours faithfully,
SGD.
(K. O. Wong)
p. John S. Bush
Attorney for Liquidator
of Development & Commercial
Bank Limited."

"Our Ref.: L. 132/2/S/76(4)

September 26, 1980

New Kok Ann Realty Sdn. Bhd.,
197-A, Batu 4 1/2,
Jalan Sendai,
P.O. Box 224,
Johore Bahru, *Attn.: Mr. Phillip A.S. Yeo.*
Malaysia.

Dear Sirs,

Your indebtedness due to
Development & Commercial Bank Ltd.
(in liquidation)

I refer to my letter of the 5th instant and regret the lack of reply from you.

Notice is hereby given that unless payment of US$125,000 is obtained from you within fourteen days from the date hereof, I shall be at liberty to institute legal proceedings against you for recovery of the debt, the interest accrued thereon and costs.

Yours faithfully,
SGD.
(K. O. Wong)
p. John S. Bush
Attorney for Liquidator of
Development & Commercial Bank Ltd."

Under cross-examination Mr. Alrington said that the plaintiff and defendant were related through shareholders. He thought that Amos Dawe owned about 40% – 50% of the defendant and also had an interest in the plaintiff although he could not say what percentage of the plaintiff was owned by him. He confirmed that Dawe was the head of the Mosbert Group and had shares in all the companies of that Group but not necessarily a controlling interest in all of them. The witness also said that the Head Office of the Group was in Hong Kong and that all transactions were recorded in the documents recovered by them. When challenged about the sums claimed by the plaintiff, the witness replied candidly that he did not know if they were loans and that he could only read the circumstances from the books recovered.

Another witness for the plaintiff was one Kee Chan Piang (P.W.1) who has been since 1981 a Group "A" officer of the Development and Commercial Bank, Johore Bahru. In June 1975 he was a cashier of that bank and he confirmed that the defendant was a customer of his bank and had an account with them then. He also confirmed that his bank had received the draft, a copy of which is shown on page 1 of "A". The draft was sent for collection and they received US$25,000 and credited the defendant's account. The witness then produced a ledger card maintained by his bank in respect of the defendant (exhibit P.2), and explained that the figure "$52,432.27" represented the nett value for US$25,000 after conversion and minus bank charges. The witness also told the court that on the same day the defendant issued cheque No. 288848 for $50,000 (exhibit P. 3) in their favour to purchase a cashier's order (exhibit P.4) in favour of the Overseas Chinese Banking Corporation, Johore Bahru. The application for the said cashier's order was also produced by him (exhibit P.5).

During cross-examination the witness said that the draft shown on page 1 of "A" was sent to the Security Pacific National Bank, Northern California, for collection. He confirmed that that bank was the collecting bank and that the defendant, which had facilities with his bank, was credited with the money the very same day the draft was received by them. In this case their bank purchased the bill shown on page 1 of "A" for M$52,500 (exhibit P. 6); but the defendant was only credited with M$52,432.27 as shown on a credit note which he produced (exhibit P.7).

After representation of the case for the plaintiff, Mr. Choo, counsel for the defendant, applied for an adjournment as he had only served one of his four subpoenas for witnesses. At the resumed hearing one Lim Mee Hai (D.W.1) told the court that he was a director of the defendant in 1975. There were three other directors as shown in the Particulars of Directors, Etc. which he produced (exhibit D.17). That witness confirmed that the defendant had an account with the Far Eastern Bank Limited and identified the chop of the defendant on a Far Eastern Bank cheque which he produced (exhibit D.19). That cheque for $246,000 was made payable to a company called National Marketing and Research Company (Pte.) Limited. He identified the first signature on D.19 as that of one Goh Eng Chong and the second signature as that of one Wong Peng Fun. The witness also said that according to a search list from the Registry of Companies and Businesses (D.18), National Marketing and Research Company (Pte.) Limited was in liquidation on August 6, 1976, and he also said that Goh Eng Chong and Wong Peng Fun were not directors of the defendant.

During cross-examination of D.W.1, he confirmed that he was a director when the Far Eastern Bank cheque (D.19) was issued, but added that he was not a signatory to accounts filed with that bank. He also confirmed that Goh and Wong were not directors of the defendant when that cheque was issued by them. The witness went on to explain that at that time most of the companies were under Amos Dawe and he appointed the directors and signatories of bank accounts. He also confirmed that the defendant was a company in Amos Dawe's set-up and added that he was Amos Dawe's employee in Mosbert Berhad when he was appointed to be a director of the defendant. D.W.1 admitted that Amos Dawe was controlling Mosbert Berhad in 1975 and the defendant was a member of the Mosbert Group.

After he was shown the list of persons holding shares in the defendant on December 31, 1975, (last page of D.17), D.W.1 confirmed that First Nominee (Pte.) Limited was Amos Dawe's company; so was South Johore Amalgamated Holdings Berhad. He then agreed that 22,999 out of the

25,000 shares of the defendant were controlled by Amos Dawe in 1975. When he was asked about the plaintiff, the witness said that he heard something about the acquisition of a bank in New Hebrides by the Mosbert Group. He could not remember receiving the cheque shown on page 1 of "A" nor did he knew what has happened to the US$25,000. He also did not know why the defendant had received the sums of money in the two cheques shown on pages 1 and 2 of "A". That witness agreed, however, that the money in them was credited into the account of the defendant and that the proceeds from the cheques on pages 1 and 2 of "A" could have been used to issue the cheque marked D.19. He, however, did not know the circumstances in which D.19 was issued and apologised for not been able to be helpful on this point.

After D.W.1 was shown the search list from the Registry of Companies and Businesses, Singapore, (D.18), he confirmed that National Marketing and Research Company (Pte.) Limited was one of the Mosbert Group companies. That witness ended his evidence under cross-examination by explaining that most of them were employees when they were appointed directors but did not know what was going on. He himself sat on the board of seven or eight companies in Malaysia and admitted that he as well as the others were supposed to be directors owing duty to the companies to which they were appointed. But in answer to questions by the Court, he said that he was only a clerk in Mosbert Berhad and never attended any directors' meeting of the defendant nor look at the accounts.

The only other witness called by the defence was one Choh Yet (D.W.2) who said that he was now a contractor. He had known Amos Dawe since 1969 and was then an accountant assisting him. He said that there were roughly one hundred companies in the Group and that Amos Dawe was the Chairman of the parent holding company which controlled all the companies in the Group. There were several people assisting him, and he himself was personally attached to Dawe and performed in both Singapore and Malaysia. He had also given instructions to the others, and confirmed that both the plaintiff and defendant were members of the Mosbert Group of companies; so were also National Marketing and Research Company and South Johore Amalgamated Holdings members of that Group. When he was shown the search list from the Registry of Companies and Businesses, Singapore (D. 18), he admitted that Goh Eng Chong, Amos Dawe and Wong Peng Fun were officers of National Marketing and Research Company (Pte.) Limited which was wound up on August 6, 1976. When the Far Eastern Bank Limited cheque (D.19) was shown to him, the witness confirmed that Goh Eng Chong and Wong Peng Fun were signatories of that cheque. He said that instructions to prepare that cheque would have come from Amos Dawe to the two of them and that it was impossible that they would have issued the cheque without the instructions of Amos Dawe. That witness also told the Court that Dawe had control and possession of all cheques of the companies and could issue instructions without anybody disobeying him as each of them had signed an undated letter of resignation to him on their appointment. Cheques could, therefore, be drawn without knowledge of the directors of the companies concerned. If a company within the Group did not have funds the usual practice was for another company within the Group having facilities with banks to give funds to the other company. The witness ended his examination-in-chief by informing the Court that Amos Dawe was still in jail in Hong Kong and that he had given evidence as a crown witness in the case against him.

D.W.2 denied during cross-examination that he was a director of the defendant in 1975 although it was a member of the Mosbert Group in that year. He also knew that the plaintiff was a member of the Mosbert Group of companies of which Dawe was the Chairman. He told the Court that the purpose of acquiring the plaintiff was to raise off-shore funds and Dawe also had interests in U.S.A., Brunei and Australia. He had heard of the Peninsula National Bank in California and confirmed that it was taken over by Dawe for the purpose of raising funds in the international market and between June and September 1975 that bank was controlled by Dawe.

After the witness was shown the cheque appearing on page 1 of "A" he said that the money would have come from California and was paid into the defendant's account. He also admitted that the plaintiff had an account with that bank and its account would have been debited with the amount shown in the cheque on page 2 of "A". The witness said that he could not recall the transaction concerning the cheque shown on page 1 of "A" because it happened ten years ago but conceded that the amount shown therein would have been credited to the defendant's account with the D & C Bank, Johore. D.W.2 also could not recall why the cashier's order in

favour of the Overseas Chinese Banking Corporation, Johore Bahru (exhibit P.4) was purchased nor could he remember what happened to the money after it was paid to the Overseas Chinese Banking Corporation, Johore Bahru. The witness also could not recall why the Far Eastern Bank cheque for $246,000 (D.19) was issued although he could confirm that National and Marketing Research Company (Pte.) Limited and National Industry of Singapore Limited were members of the Mosbert Group. He admitted under further cross-examination that he could not produce anything in writing to show that the plaintiff had authorised payments in both the said cashier's order and the Far Eastern Bank cheque (P.4 and D.19) from the defendant to the payees named therein, but he also said that it was a fact that the plaintiff has not been paid the sums of money in question. He finally said in cross-examination that it was most probably Amos Dawe who would have instructed those transactions in P.4 and D.19 to be carried out.

It was the submission of counsel for the defendant that the following three questions should be considered, namely:—

(1) Was there an agreement for a loan from the plaintiff to the defendant?

(2) Whether section 71 of the Contracts Act applied? and

(3) Whether the defendant was obliged, in the circumstances of this case by equity to repay the plaintiff.

It was the submission of Mr. Choo that there was no loan agreement and that section 71 of the Contracts Act did not apply. He also contended that the defendant was not obliged in equity to repay the plaintiff. Counsel also stated that there was no documentary evidence for a loan from the plaintiff to the defendant nor was there a written application for a loan from the defendant and that the evidence provided by the plaintiff was not sufficient to prove such loan. He also said there was only evidence that there were payments to the defendant by the plaintiff but contended that for a loan there must be an agreement.

Counsel then referred to the Privy Council case of *Siow Wong Fatt* v. *Susur Rotan Mining Limited and Another*[1] in which it was held, *inter alia*, four conditions must be satisfied to establish a claim under section 71 of the Contracts (Malay States) Ordinance, 1950. The doing of the act or the delivery of the thing referred to in the section: (1) must be lawful, (2) must be done for another person, (3) must not be intended to be done gratuitously, (4) must be such that the other person enjoys the benefit of the act or the delivery. Counsel then stated that section 71 of our Contracts Act is similar to section 70 of the Indian Contracts Act but submitted that section 71 only referred to services rendered or work done. He also submitted that there must be delivery of goods and not money and that the defendant had not enjoyed the benefit of the money received because the same money had passed on to another company.

Mr. Thomas, counsel for the plaintiff, stated that the plaintiff's cause of action was for repayment of loans. Alternatively, it was for the payment of the sums concerned by the defendant as money had and received. In the further alternative, the plaintiff contends that the defendant is bound by the provisions of section 71 of the Contracts Act, 1950, to repay or to make compensation to the plaintiff in the sum of US$125,000. Counsel also stated that the defence was a mere denial of the said loans or that they were received by the defendant to its use and/or for its benefit. He also pointed out that no evidence was adduced to show that the money received was for Mosbert Finance (Hongkong) Limited as pleaded in paragraph 7 of the amended defence. Counsel then referred to the various exhibits which show that the said sums were received by the defendant and the money used to pay the payees referred to in exhibits P.4 and D.19. He stated that it was Amos Dawe who would have given instructions to pay those sums, and then referred to the evidence of D.W.2 who could not provide any written documents to show that the plaintiff had authorised the defendant to pay the said sums referred to in exhibits P.4 and D.19. Counsel also pointed out the undisputed fact that US$125,000 was paid by the plaintiff and received by the defendant which then made payments to others which were not authorised by the plaintiff. As the monies in question have not been returned to the plaintiff, he submitted that there was a legal liability to repay the said sums and that the said loans could have been made orally without a written agreement. As regards section 71 of the Contracts Act, Mr. Thomas also referred to the Privy Council case of *Siow Wong Fatt* v. *Susur Rotan Mining Limited and Another* and stated that defence counsel had construed the said section 71 of the Contracts Act restrictively. He submitted that the giving of a bank draft is also "the doing of anything" and

added that there was no limitation that section 71 must be restricted to the delivery of goods only.

Next, on money had and received, counsel referred to the views of Lord Haldane L.C. speaking for the Judicial Committee in *Royal Bank of Canada* v. *Rex.*[2] when he said:

"It is a well-established principle of the English common law that when money had been received by one person which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover as money had and received to his use."

Counsel also referred to the following passages in the judgment of Lord Wright in *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Limited*:[3]

"It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution.

The gist of the action is a debt or obligation implied, or, more accurately, imposed, by law in much the same way as the law enforces as a debt the obligation to pay a statutory or customary impost.

The claim for money had and received always rested on a debt or obligation which the law implied or more accurately imposed, whether the procedure actually in vogue at any time was debt or account or case or indebitatus assumpsit. Even the fictitious assumpsit disappeared after the Act of 1852. I prefer Lord Sumner's explanation of the cause of action in *Jones's* case ([1926] A.C. 670, 696). This agrees with the words of Lord Atkin which I have just quoted yet serious legal writers have seemed to say that these words of the great judge in *Sinclair* v. *Brougham* ([1914] A.C. 398, 452) closed the door to any theory of unjust enrichment in English law. I do not understand why or how. It would indeed be a reductio ad absurdum of the doctrine of precedents. In fact, the common law still employs the action for money had and received as a practical and useful, if not complete or ideally perfect, instrument to prevent unjust enrichment, aided by the various methods of technical equity which are also available, as they were found to be in *Sinclair* v. *Brougham.*"

The last case referred to by Mr. Thomas was the Australian High Court case of *Walker* v. *Wimborne.*[4] In that case the directors of a company, which was one of several companies with common directors administered as a group, authorized the making by the company of four payments or series of payments. The company went into liquidation and the payments were challenged by the liquidator. The directors had formulated a general policy for moving funds between the companies in the group to meet exigencies as they arose. The first of the challenged payments had been made to a company in the group which was in financial difficulty. The only consideration for the payment was the implied promise of the recipient to repay the sum. The payer company received no benefit or advantage. The third payments were made to employees of other companies in the group as salaries and wages. There was no evidence that they had performed significant services for the payer company. It was held, *inter alia,* that the making of the third payments was a misapplication of funds for which the director who decided to make the payments was responsible and that the first payment constituted breaches of duty or breaches of trust by the directors.

Counsel also referred to the following passage in the judgment of Mason J. in *Walker* v. *Wimborne* in which His Lordship said:

"To speak of the companies as being members of a group is something of a misnomer which may well have led his Honour into error. The word 'group' is generally applied to a number of companies which are associated by common or interlocking shareholdings, allied to unified control or capacity to control. In such a case the payment of money by company A to company B to enable company B to carry on its business may have derivating benefits for company A as a shareholder in company B if that company is enabled to trade profitably or realize its assets to advantage. Even so, the transaction is one which must be viewed from the standpoint of company A and judged according to the criterion of the interests of that company."

That Australian case shows that even where companies, such as the plaintiff and the defendant, are members of a so-called "group" each company was a separate and independent legal entity, and directors in discharging their duty to the company must take account of the interest of its shareholders and its creditors who may be prejudiced by the movement of funds between companies in the event that the companies become insolvent or are wound up as in this case.

Finally, counsel referred to the power of the courts to award interest on debts in section 11 of the Civil Law Act, 1956, as well as to Order 42 rule 12 of the Rules of the High Court, 1980, on interest on judgment debts which the court may direct to be paid from the date of judgment until the judgment is satisfied. He also referred to the recent House of Lords case of *Miliangos* v. *George Frank (Textiles) Limited*[5] in which it was held that an English court was entitled to give judgment for a sum of money expressed in foreign currency.

With respect to the submissions of counsel for the defendant, I am not aware of any law which requires contracts for loans to be in writing; and in any case I agreed with counsel for the plaintiff that a loan can be made orally without a written agreement. In an ordinary case, the law does not require a contract to be made in any particular form or according to any particular formalities. A simple contract can be validly made either orally or in writing or partly orally or in writing. In the present case one must agree with defence counsel that there was no written application or other document from the defendant to the plaintiff for a loan; and from the circumstances of the case as shown by the evidence, it is only possible to infer that there must have been communications between the officers of the two companies whereby it was agreed that the two loans in question be made by the plaintiff to the defendant. A more important question for the court to consider was whether there was sufficient evidence to show that there were in fact two loans by the plaintiff to the defendant, and on the evidence adduced I was satisfied that the plaintiff had proved on the balance of probabilities that there were two loans of US$25,000 and US$100,000 by the plaintiff to the defendant as averred in paragraphs 3 and 4 of the amended statement of claim. Although the defendant has denied the said two loans in its amended statement of defence, the two witnesses for the defence have agreed that the sums in question were received by and credited into the defendant's account with the Development and Commercial Bank, Johore Bahru, and the second defence witness also said that it was a fact that the plaintiff has not been paid the sums of money in question. In those circumstances it was my judgment that the plaintiff was entitled to the repayment of the said loans or debts of US$25,000 and US$100,000 as claimed by it.

In case it was held that the said sums of US$25,000 and US$100,000 were not advanced to the defendant as loans, the plaintiff had contended in the alternative that the defendant was liable to account for the said sums as money had and received. I did not think that it was necessary to consider the plaintiff's claim in the alternative for money had and received because, as I shall explain later on, it was my judgment that section 71 of our Contracts Act, 1950, applied in this case. The theoretical basis for an action for money had and received is based on quasi-contractual liability and is still doubtful and has also been controversial. There are two main theories namely, (1) that liability is based on an implied contract (see *Sinclair* v. *Brougham*[6]; *Transvaal and Delagoa Bay Investment Co. Ltd.* v. *Atkinson*[7]; *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Limited*); and (2) that liability is derived from the principle of unjust enrichment. And yet another suggestion is that although the basis of the action is an implied promise to repay, such a promise will be implied only where an element of unjust enrichment exists (*Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Limited*; *Transvaal and Delagoa Bay Investment Company Limited* v. *Atkinson*). Although the matter has not yet been finally resolved in England, in so far as the present case is concerned the court need not consider the alternative claim for money had and received and as indicated above need only consider, as pleaded by the plaintiff in the further alternative, whether section 71 of our Contracts Act, 1950, applies. Section 71 of our Contracts Act is, as pointed out by counsel for the defendant, similar to section 70 of the Indian Contract Act and is as follows:

"Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."

According to *Pollock and Mulla* on the Indian Contract and Specific Relief Acts (9th. edition) at page 497 there is good authority for saying that section 70 of [the Indian] Contract Act was framed in the present form with a view to avoid niceties of English law on the subject of quasi-contract. According to the learned authors of that book, the section is not founded on contract but embodies the equitable principle of restitution and unjust enrichment. According to them the principle of unjust enrichment falls under section 69 and 70 (sections 70 and 71 of our Contracts Act). But these sections are wider in scope than the doctrine as applied in England and go far beyond it. And according to them "the terms of [section 71 of our Contracts Act] are unquestionably wide but applied with discretion they enable the Courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract." (See *Suchard* v. *Belaram*[8] quoted with approval in *State of West Bengal* v. *B.K. Mondal & Sons*[9]).

I therefore rejected the contention of counsel for the defendant that section 71 of our Contracts Act was only concerned with services rendered or work done and also that there must be delivery of goods and not money. I agreed with Mr. Thomas that defence counsel had construed section 71 of

the Contracts Act restrictively, and also agreed with his submission that giving a bank draft is also the delivering or doing of anything within the meaning of that section and that there should be no limitation on the construction of that section restricting it to the delivery of goods only. In fact that submission is supported by the views of the learned authors of Pollock and Mulla on the Indian Contract and Specific Relief Acts (9th. edition) where they have stated at page 504 that the expression "does" in section 71 of our Contracts Act, 1950, includes payment of money.

As section 71 of our Contracts Act, 1950, applied in this case, it was only necessary to consider whether the four conditions referred to by their Lordships in the Privy Council case of *Siow Wong Fatt* v. *Susur Rotan Mining Limited and Another* have been satisfied to establish the plaintiff's claim under that section. The doing of the act or the delivery of the thing, that is, the two drafts by the plaintiff to the defendant in this case was in my judgment lawful. It was done for the defendant, that is, the two bank drafts were sent by the plaintiff to the defendant and there was no evidence to show that the two sums in question were intended to be gratuitous payments by the plaintiff to the defendant. In fact the ledger sheet in respect of the defendant (P. 13) in the plaintiff's General Ledger and Journal shows that the two sums of US$25,000 and US$100,000 were loans or advances. I was also satisfied on the evidence that the defendant had enjoyed the benefit of the act or the delivery of those two bank drafts and that it was thereby able to use the proceeds therein for payment of monies to another company as evidenced by the cheque marked D.19. As all the four conditions of the said section have been satisfied, the plaintiff has, therefore, established its claim under section 71 of the Contracts Act, 1950, and was therefore also entitled to judgment as pleaded in the further alternative.

Apart from ordering the defendant to pay the plaintiff US$125,000, I also ordered the defendant to pay interest under section 11 of the Civil Law Act, 1956, at the rate of 3% with effect from July 1, 1981, that is the first day of the month after this suit was filed on June 17, 1981, until the date of judgment, that is December 6, 1985. The defendant was also ordered to pay interest under Order 42 rule 12 of the Rules of the High Court, 1980, at the rate of 8% per annum with effect from the date of judgment until the judgment is satisfied. The plaintiff was also, of course, entitled to taxed costs and I so ordered.

SUPREME COURT.

K.Y. Choo for the appellant.
T. Thomas for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): This is an appeal against the decision of the learned Judge in respect of two bank drafts amounting to US$125,000.00.

Briefly, the respondent/plaintiff was a company incorporated in New Hebrides (now known as Vanuatu) and carried on business of a bank until it was ordered to be wound up by the New Hebrides High Court on April 30, 1976. As a result an action was initiated by the Official Receiver of Vanuatu as the liquidator of the respondent to claim from the appellant/defendant repayment of loans of US$25,000.00 and US$100,000.00 or alternatively the equivalent thereof in ringgit.

According to the respondent by a cheque which was duly honoured) dated June 23, 1975 and drawn by the respondent on the Peninsula National Bank of Burlingame, U.S.A. the respondent advanced by way of loan to the appellant the sum of US$25,000.00. By a further cheque (which was also duly honoured) dated August 18, 1975 and likewise drawn on the said Peninsula National Bank, the respondent advanced to the appellant by way of loan the further sum of US$100,000.00.

The appellant denied requesting the respondent for any advance by way of loan of US$25,000.00 or US$100,000.00. The appellant said that if the two sums were paid into the appellant's bank account then the appellant had not at any time agreed or promised to repay the said sums or any sum. The appellant further said that if the said sums were remitted by the respondent to the appellant then the appellant contended that they were not for the benefit of the appellant but for the use or benefit of Mosbert Finance (Hongkong) Ltd or other persons or companies.

The points taken by the appellant before us were also raised in the lower court. They were, with respect, dealt with very carefully by the learned Judge. The respondent claimed the money under three alternative heads, namely, loans, money had and received and section 71 of the Contracts Act, 1950. The learned Judge gave judgment in the respondent's favour under the headings of loans and section 71 of the Contracts Act, 1950.

In this drama the central figure was Amos Dawe the head of the Mosbert Group whose head office was in Hong Kong. There were roughly some one hundred companies in the Group and Amos Dawe was the Chairman of the parent holding company which controlled all the companies in the Group. He was assisted by several people in Singapore and Malaysia. Both the appellant and the respondent were members of the Group. In fact 22,999 out of 25,000 shares of the appellant were controlled by Amos Dawe in 1975. The National Marketing and Research Company (Pte) Ltd was also a member of the Group. It was the practice of Amos Dawe to appoint directors and signatories of bank accounts for those companies under his control. The word "Group" here is used to mean a number of companies which are associated by common or interlocking shareholdings, allied to unified control or capacity to control. Whatever may be the control each company is still a separate and independent legal entity. Amos Dawe could issue instructions without anybody disobeying him as each of these persons involved usually had signed an undated letter of resignation to him on his appointment. Cheques would, therefore, be drawn without the knowledge of the directors of the companies concerned. If a company within the Group did not have sufficient funds the usual practice was for another company within the Group having facilities with banks to provide funds to the other company. The appellant was acquired by the Group for the purpose of raising off-shore funds as Amos Dawe also had interests in U.S.A., Brunei and Australia. The Peninsula National Bank of California was under his control between June and September, 1975 for the purpose of raising funds in the international market.

The appellant had four directors, namely, Liew Sin, Daud Abdullah Hey, Yeoh Nam Hwa and Lim Mee Hai (D.W.1). As a result of a resolution passed on November 6, 1974 five named persons, not directors of the appellant, classified under *Group A* were allowed to sign cheques. Goh Eng Chong and Wong Peng Fun were two of the five persons named. The three directors allowed to sign cheques were classified under *Group B*. (See pages 81 and 82 of the Appeal Record.)

The appellant was a customer of the Development and Commercial Bank, Johore Bahru and in June, 1975 the bank received a draft of US$25,000.00 for collection. It is not in dispute that S$52,432.27 representing the nett value of US$25,000.00 after conversion and minus bank charges, were credited to the appellant's account with the bank. On the same day, the appellant issued a cheque for $50,000.00 in the bank's favour to purchase a cashier's order in favour of Overseas Chinese Banking Corporation, Johore Bahru. The balance of $2,432.27 was retained in the appellant's account with the bank. The application for cashier's order was signed by Yeoh Nam Hwa, a director of the appellant. (See page 87 of the Appeal Record). However, the cheque in favour of Development and Commercial bank was signed by Choh Yet (D.W.2) and Lim Meng Ah both signatories under *Group A*. (see pages 81 and 85 of Appeal Record.)

The appellant also had an account with Far Eastern Bank. A cheque of the said bank for $246,000.00 was made payable to a company registered in Singapore called National Marketing and Research Company (Pte) Ltd. (See page 95 of the Appeal Record.) The cheque was signed by Goh Eng Chong and Wong Peng Fun, both not directors of the appellant but signatories under *Group A*. (See pages 81 and 82 of the Appeal Record.)

It was the contention of the appellant that there was no loan agreement and that section 71 of the Contracts Act, 1950 did not apply. The appellant was not obliged in equity to repay the respondent. There was no documentary evidence for a loan from the respondent to the appellant and the evidence adduced by the respondent was not sufficient to prove such a loan. There was evidence of payments to the appellant by the respondent but it was contended that for a loan there must be an agreement.

For the respondent it was stated that the cause of action was for repayment of loans. Alternatively, it was for the payment of money had and received. In the further alternative the respondent contended that the appellant was bound by the provisions of section 71 of the Contracts Act, 1950, to repay or to make compensation to the respondent in the sum of US$125,000.00. The defence was a mere denial of the said loans or that they were received by the appellant for its use or for its benefit. There was no evidence to show that the money received was for Mosbert Finance (Hong Kong) Ltd. as pleaded. From the evidence so far adduced it cannot be disputed that the two sums of money were received by the appellant and used to pay the payees referred to in P.4 (see page 86 of the Appeal Record) and D.19 (see page 95 of the Appeal Record.) There was no evidence to show that the payments made by the

appellant to the payees were authorised by the respondent. The loans could have been made orally without a written agreement.

We do not consider it necessary to deal with the various authorities cited but would refer only to *Siow Wong Fatt* v. *Susur Rotan Mining Ltd. & Anor.*[1] There the Privy Council held, *inter alia,* that four conditions must be satisfied to establish a claim under section 71 of the Contracts (Malay States) Ordinance, 1950. The doing of the act or the delivery of the thing referred to in the section:

1) must be lawful;
2) must be done for another person;
3) must not be intended to be done gratuitously;
4) must be such that the other person enjoys the benefit of the act or the delivery.

For the appellant it was said that section 71 of our Contracts Act is similar to section 70 of the Indian Contracts Act and that section 71 only referred to services rendered or work done. The contention of the appellant was that there must be delivery of goods and not money and that the appellant had not enjoyed the benefit of the money received as the same money had passed on to another company. On the other hand, the respondent said that the appellant construed section 71 restrictively. He submitted that the giving of a bank draft is also "the doing of anything" and that there was no limitation that section 71 must be restricted to the delivery of goods.

The learned Judge had also touched on the question of money had and received but considered it unnecessary to consider this as he took the view that section 71 of the Contracts Act, 1950 applied on the facts of the case. He was also satisfied that the respondent had proved on the balance of probabilities that there were two loans of US$25,000,00 and US$100,000.00 by the respondent to the appellant.

In his judgment at page 39 he stated:

> "..... I am not aware of any law which requires contracts for loans to be in writing; and in any case I agreed with counsel for the plaintiff that a loan can be made orally without a written agreement. In an ordinary case, the law does not require a contract to be made in any particular form or according to any particular formalities. A simple contract can be validly made either orally or in writing or partly orally or in writing. In the present case one must agree with defence counsel that there was no written application or other document from the defendant to the plaintiff for a loan; and from the circumstances of the case as shown by the evidence, it is only possible to infer that there must have been communications between the officers of the two companies whereby it was agreed that the two loans in question be made by the plaintiff to the defendant ...".

He went on at page 40:

> "... Although the defendant has denied the said two loans in its amended statement of defence, the two witnesses for the defence have agreed that the sums in question were received by and credited into the defendant's account with the Development Bank, Johore Bahru, and the second defence witness also said that it was a fact that the plaintiff has not been paid the sums of money in question .....".

After referring to *Pollock and Mulla* on the Indian Contract and Specific Relief Acts, 9th Edition, in respect of section 70 of the Indian Contract, the learned Judge said at page 43 of the Appeal Record:

> "I therefore rejected the contention of counsel for the defendant that section 71 of our Contracts Act was only concerned with services rendered or work done and also that there must be delivery of goods and not money. I agreed with Mr. Thomas that defence counsel had construed section 71 of the Contracts Act restrictively, and also agreed with his submission that giving a bank draft is also the delivering or doing of anything within the meaning of that section and that there should be no limitation on the construction of that section restricting it to the delivery of goods only. In fact that submission is supported by the views of the learned authors of *Pollock and Mulla* on the Indian Contract and Specific Relief Acts (9th Edition) where they have stated at page 504 that the expression 'does' in section 71 of our Contracts Act, 1950, includes payment of money."

The learned Judge also considered that all the four conditions in section 71 of the Contracts Act, 1950 had been satisfied and the appellant had therefore established its claim under the said section.

We cannot see how the appellant can now complain that the cheques were not signed by the directors of the appellant. The resolution dated November 6, 1974 was passed by the directors of the appellant which authorised five named persons to sign cheques of the appellant. The appellant had not been able to convince us that the learned Judge has erred in law or in fact in coming to his decision. There is no reason for us to interfere with his decision. Accordingly, we would dismiss the appeal with costs. Deposit to the respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *H.H. Long & Co.; & Skrine & Co.*